IS THE DOCTRINE OF "GROUP DEVELOPMENT" APPLICABLE TO THE PICKETT ACT?

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CONSOLIDATED MUTUAL OIL COMPANY, a Corporation, and J. M. McLEOD, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. } No. 2787.

CONSOLIDATED MUTUAL OIL COMPANY, a Corporation, and J. M. McLEOD, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. } No. 2788.

BRIEF IN BEHALF OF APPELLANTS.

U. T. CLOTFELTER,
CHARLES S. WHEELER,
JOHN F. BOWIE,
OSCAR LAWLOR,
A. L. WEIL,
Attorneys for Appellants.

Filed this.....day of November, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

The James H. Barry Co.,
San Francisco

Filed
NOV 14 1916
F. D. Monckton,
Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CONSOLIDATED MUTUAL OIL COMPANY, a Corporation, and J. M. McLEOD, Appellants,

vs.

THE UNITED STATES OF AMERICA, Appellee.

No. 2787.

CONSOLIDATED MUTUAL OIL COMPANY, a Corporation, and J. M. McLEOD, Appellants,

vs.

THE UNITED STATES OF AMERICA, Appellee.

No. 2788.

BRIEF IN BEHALF OF APPELLANTS.

If it can be shown that the universally recognized rule of group development is applicable in determining the question of diligent work under the Pickett Bill, then we take it that it must be conceded that the admitted facts fully bring this case within the rule.

The four quarters of Section 28 were held in common ownership and are contiguous. In June, 1909, the plan was formulated of working them as

a unit. Pursuant to this plan, a camp were erected about the common corner of the four claims. Bunk houses were constructed on the Northwest Quarter and Northeast Quarter, a cook house on the Northeast Quarter, a water tank on the Northeast Quarter and stabling facilities on the Southeast Quarter. A pipe line for water was run about five miles from the Stratton Water Company across the Southeast Quarter to the tank on the Northeast Quarter and thence distributed to all the claims. A complete standard drilling rig was erected on the Southwest Quarter near the common corner of the four claims, and derricks constructed on the other three.

Not later than August, 1909, and continuously thenceforward, all four claims were actually occupied by the workmen of defendant and the well on the Southwest Quarter was being actually drilled. On the Southwest Quarter, admittedly the work was proceeding with all possible diligence, on the date of withdrawal and until discovery. The other quarters were developed successively until oil was commercially produced within their respective boundaries.

From the relative position of the well on the Southwest Quarter to the common corner of the four quarters, a discovery of oil therein *demonstrated* to almost a mathematical certainty the existence of an oil-bearing sand on at least a part of each of the other quarters. Indeed, there is a strong probability that any oil pro-

duced in this well would be drawn from an area radiating into all the four quarters of the section.

Besides demonstrating the existence of oil on the other quarters, the drilling well tended to facilitate its extraction. It is a matter of common knowledge that the greatest as well as the most expensive and most dangerous problem of the oil operator drilling in new territory is to discover the relation of the oil-bearing to the water-bearing formations. A failure to know this very materially extends the time of drilling, increases the cost, and makes imminent irreparable injury to the entire field by infiltration of water into the oil sands. The logs of the first wells furnish this information so that subsequent wells may be normally drilled not only in less time and at a less cost, but with little or no danger from water conditions which so often prove fatal to the initial well.

In view of these facts, we earnestly contend that the drilling on the Southwest Quarter coupled with construction of the joint camp, and the actual occupancy of all four quarters, was sufficient if carried on diligently and continuously, and if followed by a discovery on the other quarters, to protect defendants against the withdrawal.

We do not contend that a discovery on the Southwest Quarter perfected the other locations, or permitted the cessation of work on the group. We do contend that work anywhere on the group, demon-

strating the existence of oil on all four quarters and tending to facilitate its extraction was sufficient so long as it was diligently and continuously carried forward to a separate discovery on each claim.

THE LAW OF GROUP DEVELOPMENT.

There are three statutes referring to the amount of work to be done by a mineral claimant.

(a) Section 2324 of the Revised Statutes referring to annual assessment work.

(b) Section 2325 of the Revised Statutes requiring the expenditure of Five Hundred Dollars as prerequisite to a patent.

(c) The provisions of the Pickett Act relating to diligent and continuous work on lands in the withdrawn area.

The first of these statutes applies only between adverse claimants; the second and third apply only between claimants and the Government. The first and second are operative only after a discovery; the third only before discovery.

Now, the purposes of these statutes are different, and the *quantity* of work required varies in each, but there is no difference in the *kind* or *character* of the work required. The statutes make no distinction as to the *kind* of work, the decisions make no distinction, reason makes no distinction.

Work on a mining claim is either a mere pretense, or it is legitimate and bona fide. The latter is what the law requires in all cases, whether it be as against an adverse claimant, or for a patent, or against the effect of a withdrawal.

There can only be one sort of legitimate *bona fide* work on a mining claim, and that is work which is designed to demonstrate the existence of the mineral, and then facilitate its extraction. Every one of the decisions, however it may be phrased, resolves itself to this.

It is therefore obvious that work of the same kind and character—though not necessarily of the same amount or cost—which would be legally sufficient to constitute annual assessment work and which if carried to the extent of five hundred dollars, would be sufficient to entitle the claimant to a patent, will also, if carried on diligently and continuously, protect the land against a withdrawal.

What, then, is the kind of work required by Sections 2324 and 2325 of the Revised Statutes? May it be work done on one of a group of claims? For if it appears that group development work or work outside the limits of a claim satisfies the requirements of Sections 2324 and 2325 of the Revised Statutes, then such work also satisfies the requirements of the Pickett Bill.

It is clearly established that annual assessment work may be done on one of a group of claims:

Mt. Diablo Mill & Mining Co. vs. *Callison,* 17 Fed. Cases, 918.

"Work done outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claims as if done within the boundaries of the claim itself. One general system may be formed well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it."

Jupiter Mining Co. vs. *Bodie,* 11 Fed., 666.

By Sawyer, J., instructing the jury:

(Page 682) "Work done outside the claims, or outside of any claim, if done for the purpose, and as a means of prospecting or working the claim is as available for holding the claim as if done within the boundaries of the claim itself."

Approved and quoted by Judge Hawley in *Book* vs. *Jupiter Mining Co.,* 58 Fed., p. 117.

Justice Mining Co. vs. *Barclay,* 82 Fed., 554.

(Page 560) Assessment work "may be done upon other claims or upon other ground, where, as here, it is in reasonable proximity to it, and if the work as done would be beneficial and tend to

the future development or improvement of the claims, it is sufficient."

Anvil Hydraulic Co. vs. *Code,* 182 Fed., 205.

"Where several claims are held in common, the annual assessment work for all may be done on one of the claims, or upon adjacent patented land, or even upon public land, provided that the claims are contiguous, and that the work is for the benefit of all of them, and tends to develop them all and to facilitate the extraction of ore therefrom."

An instruction to the jury as follows was approved, defining the words "work of benefit or value" as "work" which tends either to enhance the value of the claim in dollars and cents or which is of use in prospecting and developing or operating the claim as a mining claim.

In

St. Louis Mining Co. vs. *Kemp,* 104 U. S., 636,

Mr. Justice Field used substantially the same language as was used by Judge Gilbert in the Anvil Hydraulic case.

See also

Doherty vs. *Morris,* 28 Pac. (Colo.), 85;
Sexton vs. *Washington,* 104 Pac. (Wash.), 614.

Section 2324 of the Revised Statutes concerns only adverse claimants and by its terms permits group development. It is therefore important to note that the very same principles are applied in construing

Section 2325, which concerns the rights of the operator as against the Government and which not only makes no mention of group development, but requires that the work be done "upon the claim."

The question is very fully discussed in

Copper Glance Lode, 29 L. D., 542.

The case involved the character of work necessary in order to get patent. The cases on annual assessment work were reviewed at great length, and then Secretary Hitchcock said:

> "Manifestly, however, in determining the character and the purpose of labor and improvements had upon a mining claim with respect to their use in the development of the claim or in the development of several claims held in common, the same principle must apply whether the labor was performed or the improvements were made in satisfaction of the requirement of said Section 2324 for the maintenance of the possessory title or in fulfillment of the condition to obtaining the paramount title prescribed by Section 2325 of the Revised Statutes.
>
> "While in the one case the annual expenditure in labor or improvements goes only to the right of possession, and is a matter between rival or adverse claimants, the determination of which is committed to the courts, and in this respect is essentially different from the expenditure of five hundred dollars in labor or improvements required in the other case as a condition to obtaining patent, which is a matter between the applicant for patent and the Government, the determination of which belongs to the Land Department, yet in determining

whether labor and improvements had upon a mining claim or upon several claims held in common are of such a character and are so situated as that they may be properly used in the development of the claim or claims in common, and were so intended, the same principle must necessarily govern in either case."

Secretary Hitchcock then laid down the following requirements for work done on several claims:

1. It must facilitate the extraction of minerals from the claims held in common, though outside of all of them.

2. The claims must be adjoining or contiguous.

3. Such expenditure must have been intended to aid in the development of all the claims.

This doctrine was approved in *Zepher and Other Lode Claims,* 31 L. D., 510. In

Kirk vs. *Clark,* 17 L. D., 190,

it was held that shallow shafts which were not of any use in the ultimate prosecution of work, but by which the pitch or incline of the bedrock could with reasonable certainly be ascertained, and data furnished on which to base an intelligent estimate of the proper depth at which to begin working a tunnel, were sufficient.

Kirk vs. *Clark* was approved in *C. K. McCormick,* 40 L. D., page 502, which further held that a drill hole upon a claim for the purpose of prospecting it

in order to secure data upon which further development could be based was sufficient, and in the case involving the Tintic Lode Claims, which has not been reported, a decision of the Land Office was to the effect that the diamond drill holes on an adjoining claim for the purpose of prospecting it were sufficient under the group development theory. This case, as will be noted, is very close to the facts in the case at bar.

The rule established by the cited cases was recognized and applied to the Pickett Bill by Judge Riner of Wyoming in *United States* vs. *Ohio Oil Company* (not yet reported). It decides the very question here involved in accordance with appellant's contention. The judgment has been recently affirmed by the Circuit Court of Appeals of the Eighth Circuit but the point here involved was not discussed by the Appellate Court.

One of the questions in the Ohio Oil case was whether the defendants were diligently at work at the time of the withdrawal. Defendants claimed the East Half of the Southwest Quarter of Section 18 in Wyoming. The withdrawal there involved was made on May 6, 1914. A well was drilled on the Northwest Quarter, but nothing at all was done on the Southwest Quarter until July, 1914, or more than seventy days after the withdrawal. There was not even a skeleton derrick on the Southwest Quarter. It was urged by the defendants that the work on the

Northwest Quarter was sufficient to hold both locations on the group development theory as against the withdrawal. Judge Riner sustained the contention, and said:

> "I think the evidence shows that this work was done and the expenditures made for the benefit of the several claims. It has been so often decided that labor and improvements within the meaning of the statute are deemed to have been had on a mining claim when labor is performed and improvements made for its development, that is, to facilitate the extraction of the mineral the claim may contain, though in fact such labor and improvements be at a distance from the claim, that the citation of authorities seems unnecessary."

The method that was adopted for developing the group in the case at bar may not have been ideal, and may not have been best calculated to develop it, but this is not material. In

Hughes vs. *Ochsner,* 26 L. D., 540-543,

it was said:

> "Civil engineers . . . may honestly differ as to the probable results to be had from a plan of development, and this may be involved as is often the case in such operations in considerable uncertainty, but if money or labor is expended in good faith in the furtherance of the plan, the Department will not look beyond the fact of expenditure."

Approved in *C. K. McCormick,* 40 L. D., 498. See also *Mann* vs. *Budlong,* 129 Cal., 577.

Is there anything in the language of the Pickett Bill which precludes this Court from holding that the *same kind* of work which would be sufficient for patent after discovery if carried to the extent of $500.00 is also sufficient to protect the land against withdrawal if carried on diligently and continuously?

Up to the time of the passage of the Pickett Bill Congress had never recognized any rights whatsoever in the claimant of mineral lands before discovery.

The placer mining law was, therefore, entirely unsuited to the physical conditions of oil mining. But no serious injustice resulted until the withdrawal of 1909 was promulgated. To ameliorate the uncertainties thereby created, Congress passed the Pickett Bill. Here for the first time in our mining law the rights of an occupant or claimant of oil-bearing lands prior to discovery received legislative recognition.

The Pickett Act therefore introduces a new conception so far as the mining statutes of this country are concerned. The explorer or operator who had not yet reached a discovery, was given a status. Just as the law as it stood before the Pickett Act recognized the claimant before patent and required of him work of a certain value, so the Pickett Act recognizes the prospector before discovery, and requires of him similar work; the only difference being that the test of good faith imposed upon the claimant after discovery was that his work should equal in value the amount fixed by the statute; the test of good faith applied to

the prospector under the Pickett Act is that his work should be diligent and continuous. Beyond this distinction there is no warrant in the act itself or in the interpretation of the prior mining law for the position that the manner and kind of work which was sufficient for the explorer after discovery is not sufficient under the Pickett Act for the explorer before discovery.

Eliminating the limitation as to the money value, and substituting therefor the requirement of due diligence and continuous work, that which under the former mining laws fixed the rights of the claimant after discovery, under the Pickett Act fixes the rights of the prospector before discovery.

We are in accord with the Government's contention that the Pickett Bill did not purport to be a self-contained statement of the law on the subject, but that it must be read in the light of the existing mining law.

The only difference between the Government and the defendants is that the Government reads the Pickett Bill in the light of a portion of the existing mining law, while defendants insist that the whole of the existing mining law is applicable.

Thus the Government vigorously argues that the rule of *Miller* vs. *Chrisman* and similar cases was incorporated in the Pickett Bill. This we concede because these cases were a part of the existing mining law. But our concession is limited by the proviso that

the rule of these cases was only incorporated insofar as it was applicable.

The Miller case, as well as all the other California decisions, concerned only the development of isolated claims, and had nothing to do with a group of claims. There is nothing in the language of the statute to justify the inference that it adopted part and rejected part of the general mining law. But, on the contrary, the fair inference is that it adopted the general law as to isolated claims where it was applicable and the general law as to a group of claims where it was applicable.

We cannot subscribe to the Government contention that all recognized principles of the mining law were irrevocably discarded by Congress except the principle enunciated in *Miller* vs. *Chrisman.*

But appellants are not compelled to rest their case on this well established rule of statutory construction alone.

Nowhere in the Pickett Bill is it said that the work must be done upon the land or upon the claim. In view of the Government's constant iteration that Congress was simply and exclusively enacting *Miller* vs. *Chrisman,* the omission of this or similar language is very significant.

The proviso of the Pickett Bill is:

> "Provided that the rights of any person who at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide occupant or claim-*

> *ant* of oil or gas-bearing lands and who at such date is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired," etc.

The language of *Miller* vs. *Chrisman* which the Government claims was adopted exclusively is:

> "One who thus in good faith makes his location, *remains in possession* and with due diligence prosecutes his work to discovery is fully protected," etc.

Can we assume that the omission of the significant words *"remains in possession"* was inadvertent?

The omission of these words and the departure from the narrow scope of *Miller* vs. *Chrisman* is emphasized by the use of the words "occupants or claimants." The word "occupant" was obviously designed to cover the *Miller* vs. *Chrisman* situation, and refers to one who "remains in possession." It clearly designates one in *pedis possessio,* which is obviously necessary if the work is to be done within the boundaries of the claim. But why the use of the word "claimant"? If a claimant must necessarily be at work upon the claim itself, it predicates *pedis possessio,* hence an occupant and the addition of the word "claimant" lends no additional meaning to the statute.

The only construction which gives effect to all the language of the statute is one that recognizes the sufficiency of diligent work off the claim or, in other words, the principle of group development.

As against our position, the Government contends

that nothing but the actual work of drilling a well on each claim can protect the defendant. Unused houses and unused derricks, says the learned counsel, are not sufficient, therefore, actual drilling will alone suffice. Absence of water or other equipment is, they say, no excuse for lack of drilling; nor is work, such as laying a water line to supply such needs, because not done upon the land. At times the government seems to repudiate this position but it is again put forward on p. 12 of its Reply Brief when it says:

> "If discovery of oil on a particular quarter section cannot be said to be a discovery on one or more additional quarters, the drilling on a particular quarter section cannot be said to constitute work leading to the discovery of oil or gas on one or more additional quarters."

This view not only necessitates a narrow and illiberal construction of an avowedly remedial statute and the absolute disregard of certain of its language, but is in direct hostility to the adjudication of the land office as expressed in the Honolulu Oil Company case and the opinion of Judge Riner in *United States* vs. *Ohio Oil Co.,* which are the only decisions dealing with group claims under the Pickett Bill.

Finding small comfort in either the statute or the adjudicated cases, the Government indulges in argument *ad captandum,* as one of the learned counsel was pleased to designate it. A great fear is expressed that many claims will fall into few hands, and the Govern-

ment policy of encouraging the development of small parcels by numerous small operators be defeated.

The suggestion that thousands of acres might be held on the group theory ignores the limitations of the law relating to it, that the claims *must be contiguous* and the work must tend to prove their mineral character or facilitate the extraction of mineral from all.

The land office and the courts have never had any difficulty in applying the principle to Section 2324 and Section 2325 of the Revised Statutes, and the same problems are presented here.

It is a question of fact depending on the circumstances of each case. In the vast majority, the determination of whether the group claim is legitimate and *bona fide* will be comparatively simple. Some difficult questions may arise, but we are not concerned with them here where only four quarter sections are involved and the situation is perfectly obvious. It seems rather strained to contend that defendants are trying to hold a large area with a small amount of work, pursuing a "dog in the manger" attitude, when the Government has always been ready to grant a patent for 160 acres on $500.00 worth of expenditures and for 640 acres on $2000.00 of expenditures, while we show the expenditure of $20,000.00, or ten times the Government requirements, for patent before the Taft withdrawal and in excess of $500,000.00 up to May,

1914, or enough to patent 1000 claims of 160 acres each.

That the acts of the locators must be such as to give notice to the public of their claims is fully satisfied by the erection of buildings, the actual occupation thereof at all times, and the public record of the locations so that either by physical inspection of the land or by a search of the records the claim was fully disclosed.

The statement in the Government brief (see p. 56) "That the 'assessment work' required by the decision "and by Section 2324 is not the *kind* of 'work' re- "quired by that act" (Pickett Bill), is wholly unsupported by the authorities. The *amount* of annual assessment work, to wit, $100.00 per annum, is admittedly not sufficient before discovery to hold either a single claim or a group of claims, and this is all that the cases decide. If, however, the *kind* of work, good as annual assessment work is carried on diligently and continuously, and without the limitation of a $100.00 value, then it is sufficient.

The obvious misstatement of the authorities on this point discloses the vital weakness of the Government's argument, which depends entirely on the establishment of this theory.

So again the attempt is made to show that group development depends exclusively on statutory authorization therefor, and Section 2324 of the Revised Statutes is several times quoted. But this requires

us to ignore absolutely Section 2325. This section states the amount of work prerequisite to patent. Like the Pickett Bill, it governs the rights of the operator against the Government. Again, like the Pickett Bill, it does not in terms permit, or even refer to, group development. It even goes beyond the Pickett Bill in its restrictions by providing that the improvements must be "made upon the claim."

And still, the Land Department has held again and again that the $500.00 worth of work may be done on one of a group of claims, and it has so held because that is the general mining law, in the light of which all statutes must be read.

Where then is the justification for the language on pages 58 and 59 of Appellee's Brief that "a "patent expenditure of $500.00 must be made *on* "*each claim*" (their italics), or "The only departures "which have been made from these requirements "have been *made in express words by statutory en-* "*actment*" (their italics again).

The attention of learned counsel has heretofore been called to the inaccuracy of this statement, and their error can therefore not be attributed to inadvertence, but to the necessity under which the Government labors if it is to succeed in establishing its position. As it is incorrect, and must fall, the whole of the Government argument against group development of which it is the foundation must fall with it.

The citation of *Smith* vs. *Union Oil Co.* discloses a

singular misapprehension of our position in these cases. All that the learned judge there said was that annual assessment work is not sufficient to hold a group of claims *before discovery*. This is, of course, correct and it might be added that the same ruling might have been made as to hold even one claim.

But the case throws an interesting light on the relation of the *Miller* vs. *Chrisman* rule to the Pickett Bill. In the Smith case, the defendant, by continuously drilling on one quarter, was attempting to hold another quarter under the so-called Five Claims Act. But at the very time, another operator who had entered peaceably, was likewise drilling diligently on the quarter so claimed.

Now, the rule of *Miller* vs. *Chrisman* only protects the diligent operator as against forcible, fraudulent, surreptitious or clandestine entries, and it is obvious that in spite of diligent work, anyone can peaceably enter land which is being drilled and, if he make a prior discovery, obtain title thereto.

This is clearly shown in

Hanson vs. *Craig*, 170 Fed., p. 65.

Since the plaintiffs could have prevailed in the suit had they entered peaceably on the very claim on which the defendants were at work, it is obvious that plaintiffs could not be ousted where they were diligently at work on an unoccupied claim belonging to a group.

It is therefore apparent that the Pickett Bill gives a

greater right against the Government than *Miller* vs. *Chrisman* gives as against adverse claimants. For, as stated, the diligent operator under the Miller rule is subject to defeat by one peaceably entering and first discovering oil, while under the Pickett Bill the claimant's rights are absolute so long as he continues at work.

The language of the Court in *Hanson* v. *Craig,* quoting *Costigan on Mining Law,* is as follows:

> "*Pedis possessio* means actual possession and pending a discovery by anybody the actual possession of the prior arrival will be protected to the extent needed to give him room for work and to prevent probable breaches of the peace. But while the *pedis possessio* is thus protected, it must yield to an actual location on a valid discovery made by one who has located peaceably and neither clandestinely nor with fraululent purposes."

Approved, *Hall* vs. *McKinnon,* 193 Fed., p. 577.

There remains only on this point the case of *Gird* vs. *California Oil Co.,* 60 Fed., 531, with which counsel purposes to dispose of group development. In that case, the attempt was made to hold 80 claims before discovery on the group development theory, and in it the learned Judge very fitly disposes of learned counsel's fears that if the doctrine was recognized, large areas might be held with an inadequate expenditure.

The vital question is, did the Court deny the ap-

plicability of the principle of group development? By no means. On the contrary, the fair inference is that the group development theory is applicable even before discovery in a proper case, but that in the case before him, the claims were not contiguous, and too remote to justify it.

The language of the Court (p. 542) is:

> "In the case at bar, none of the work done or expenditures made by the lessees of plaintiff relied on to sustain the claim to the Whale Oil were done or made on any claim contiguous to it . . . the claims so held in common must, as said by the Supreme Court in *Chambers* vs. *Harrington,* be contiguous, and the labor and improvements relied on must be made for the development of the claim to which it is sought to apply them; that is, in the language of the Supreme Court, 'to facilitate the extraction of the minerals it may contain.' This, I think, cannot be justly affirmed of any part of the large expenditures shown to have been made by the lessees of the plaintiffs in the development of some of the claims embraced by the leases, all of which are remote from, and none contiguous to the Whale Oil."

If the learned Judge was of the opinion that the group theory did not apply before discovery, he would certainly have said so, and not burdened himself with an extended analysis of a complicated situation.

In view of the language quoted, it is a fair inference that the only reason for the decision on this point

was that the facts showed the various claims too remote from the place where the work was done.

Respectfully submitted.

OSCAR LAWLOR,
Attorney for Appellant McLeod.

W. T. CLOTFELTER,
A. L. WEIL,
CHARLES S. WHEELER,
and JOHN F. BOWIE,
Attorneys for Appellants, Consolidated Mutual Oil Co.